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NEED OF A NATIONAL INCORPORATION LAW

WHEN the report of the Committee on Uniformity of Legislation was submitted to the last American Bar Association, and consideration of the legal problems growing out of modern commercial combinations, was urged as a matter proper for discussion and action by that association, it was gravely argued by distinguished lawyers present that there was no *legal* problem to be solved. The Committee on Commercial Law, however, thought otherwise and said:—

“The American people look to the American Bar for leadership on this question. Some one must lead. If not the lawyer, then it will be the demagogue.”

I. *Is there a legal problem involved?* The writer thinks there is; this view, however, having been challenged, perhaps it is worth while to recall something of the basis for the general belief that there is a problem of a legal character.

Early in the seventies railroad amalgamation and pools became frequent, and to counteract, in some measure, the result, the state legislatures very promptly established railroad commissions, and passed maximum rate laws. In the eighties the alliance between large shippers and transportation companies, with glaring freight discriminations was made clear by the investigations of the Ohio, New York, and Ontario legislatures, and the United States Congress, and twenty or more State Anti-trust Acts,¹ and the Interstate Commerce Act,² and the National Anti-trust Acts,³ were passed. These proved insufficient, and combination and discrimination continued.

Just before the Chicago Trust Conference, held in Sept. 1899, the Civic Federation gathered the opinions of a great number of business men throughout the country as to what was the effect of these combinations, with this result :⁴ 105 thought *consumers* were injured, 24 thought they were benefited, and 41 thought there was no difference; 452 out of 506 thought *prices* were raised; 293 out of 356, thought there was danger to *investors*; 266 out of 345 thought the large *capitalization* was dangerous to our *financial system*; 300 thought our *foreign trade* would be *benefited*; 180 thought *wages* were increased; 148 thought they were *decreased*, and 67 were doubtful; 270 regarded the *tendency* to combination “*with appre-*

¹ See Trust and Corporation Laws, Vol. II. of Report of Industrial Commission.

² 24 Stat. at Large 379, Feby 4, 1887.

³ 26 Stat. at Large 209, July 2, 1890; 28 Stat. at Large 570, Aug. 15, 1894.

⁴ Professor David Kinley, Trust Conference Report, p. 530.

hension;" 149 thought there was no danger, and 34 were doubtful; and 340 out of 431 thought some sort of *legal* remedy should be applied.

The opinions of the leading delegates to this conference, collected by the *Times-Herald*,¹ agreed that the trusts were a menace to the people, and most of them believed in federal control.

While the trust conference itself passed no resolutions on the subject, the vast majority of the speeches indicated an apprehension of grave danger, and suggested various legal remedies.

The trust conference of the governors and attorneys-general, held at St. Louis at the same time, vigorously denounced such combinations and recommended radical *legal* remedies.

The platforms of the political parties for several years have resolved that there is danger from such combinations, and urged legislative action; the messages of the governors and presidents have done likewise. Many of the states in the past few years have passed more stringent anti-trust acts, and many bills have been before Congress looking to further *legal* regulation.

The Industrial Commission after the fullest investigation, without dissent considered that a great many things were out of joint, and urged in detail many *legal* remedies,² some of which found expression or partial expression in the act³ to forward the prosecution of offenders against the anti-trust and interstate commerce laws, the anti-rebate act,⁴ and the act⁵ creating the Department of Commerce and Labor.

Such a consensus of opinion and action would indicate there is a *legal* problem involved.

II. *Genesis of the problem.* The leading *legal* conditions under which the problem has developed have been the following: (1) The exclusive power of the National Government to control interstate commerce; (2) The unprecedented growth of corporations and corporate power; (3) The power of corporations to engage in interstate commerce; (4) The inaction of Congress in *regulating* such commerce. A short review of these may make clearer the policy, power, duty, and method of meeting the problem.

1. The *first pertinent inquiry* is why and how did the power to

¹ Sept. 11, 1899.

² Report Vol. I, p. 5; Vol. XIX., pp. 197, 481, 649, 947, 1010, 1067, 1083.

³ Feby 11, 1903, ch. 544 § 3.

⁴ Feby 19, 1903, ch. 708.

⁵ Feby 14, 1903, No. 87.

regulate commerce come to be given to Congress, and what duty to promote the *general* welfare arises thereunder?

In 1753 George Washington was sent by Governor Dinwiddie to the French forts above Pittsburg on the Allegheny river to inquire by what authority the French were, and to warn them from, invading Virginia territory.¹ Upon his return he urged upon the governor "the subject of uniting the East and West by means of a public highway."² Though not heeded Washington's idea grew into "a picture of commercial grandeur for the Old Dominion," to be attained "by building a highway over the mountains and connecting its eastern and western termini with navigable waterways, natural, or if necessary, artificial."³ The plan filled his mind, and he studied maps and routes in detail, and urged the desirability of the project among his friends. In 1774 after another western trip, he brought his plan before the House of Burgesses of Virginia, by introducing and moving "the adoption of a bill which empowered individuals to subscribe toward such an enterprise, and construct a communication at their own expense." A similar bill was brought before the Assembly of Maryland, *but jealousies regarding western trade* between Georgetown, and Baltimore, Md., prevented favorable action by either state.

Then the revolution came, and for ten years Washington could give no further attention to these plans. After the success of the revolution, "the project was of national importance—to bind the East and West with the iron bands of commercial intercourse and sympathy,"⁴ to overcome the mountain divide, and to counteract the tendency of the trade of the then West to glide down the Mississippi to the Spanish ports.

To forward his plans, Washington had surveyed at his own expense the roadway over the mountains from Cumberland, Md., to the Ohio river, and this road, twenty years later, became "the chain of the Federal Union" by the construction on the same route of the National road, and later by the construction of the Chesapeake and Ohio canal, and the Baltimore and Ohio railroad. In 1784 he made another western trip, and on his return reported to the governor of Virginia, urging legislative action, saying in a letter "the object in my estimation is of vast commercial and political importance."⁵

¹ Historic Highways, A. B. Hulbert, Vol. 3, p. 108.

² Historic Highways, A. B. Hulbert, Vol. 3, p. 189.

⁴ A. B. Hulbert, Hist. Highways, Vol. 3, p. 193.

⁵ *Ib.* pp. 194-7.

³ *Ib.* 190.

"Accordingly the "Potowmac Company," "to open the navigation of the Potomac and James rivers," was chartered by Virginia and Maryland.¹ A joint commission to regulate the navigation of Chesapeake bay was appointed in 1785 by these two states, and this met at Mt. Vernon for consultation with Washington. His broader plans contemplated connecting the navigation of the bay and the Potomac, in some way with that of the Ohio; this would require Pennsylvania to join, and Washington also urged that Maryland and Virginia should settle upon a *uniform system of duties, commercial regulations, and currency*. These suggestions were sent to the legislatures of the two states; Maryland adopted them, and added that Delaware should also be consulted, and a *conference of commissioners from all the states* should be called. A little later the Virginia legislature passed a resolution based upon the report, suggested by Madison, inviting commissioners from all the states to meet at Annapolis, September 11, 1786,

"To take into consideration *the trade* of the United States, to consider how far a *uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony*; to report an act, etc."²

The commercial difficulties for which the Articles of Confederation furnished no remedy, never ceased to be a source of discord. "New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms."³ New Jersey, "who had insisted that control of commerce was a National affair,"⁴ in appointing her commissioners, had authorized them to consider not only commercial, but "*other important matters*." Only five states responded to the call, and nothing could be done except to recommend the calling of another convention. Hamilton wrote the report and call of the commissioners, saying:—

"In the course of their reflections * * they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the Federal Government, that to give it efficacy and to obviate questions and doubts concerning its precise nature and limits may require a correspondent adjustment of the other parts of the Federal system,"⁵

¹ Hist. Highways Vol. 3, p. 194-7; 1 Va. Laws Rev. 1803, p. 440, 446; 1 Laws of Md. Ed. 1811 p. 488.

² 1 Doct. Hist. Const. p. 2; Journal Constl. Conv. p. 36.

³ Journal Constl. Conv. p. 33.

⁴ Secret Journals of Cong. 1, 359.

⁵ Journal of Convention, p. 39.

and advised that commissioners be appointed by the states to meet at Philadelphia the second Monday in May, 1787,

"To take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government *adequate to the exigencies of the Union*, and to report, etc."¹

The jealous Congress of the Confederation, yielding to the necessity, resolved, February 21, 1787, to recommend that a convention be called to meet at the same time and place "for the sole and express purpose of revising the Articles of Confederation."² Twelve states sent delegates to the convention who after four months of secret deliberation, agreed to the Constitution, among other things, "*in order to promote the general welfare.*"

The third enumerated power—second only to the taxing and borrowing powers,—given to Congress, was "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes,"³ and as Mr. Justice Miller⁴ has said, without such relief,

"As a nation we must soon have perished * * * What our deranged finances, our discreditable failure to pay our debts, and the sufferings of our soldiers could not force the several states of the American Union to attempt, was brought about by a desire *to be released from the evils of an unregulated and burdensome commercial intercourse*, both with foreign nations and between the several states."

It is not too strong to say that one of the most fundamental reasons for the creation of our Federal Government in its present form, was to provide against the evils of an *unregulated commercial intercourse*.

2. *Growth of corporations:* Before the adoption of the Constitution there seem to have been only 21 business corporations incorporated within the United States,—10 for canal or navigation purposes, 4 banks, 3 bridge companies, 2 trading companies, 1 manufacturing company and one other. But the Constitution "put our foreign commerce and that between the states upon a solid footing," and before the year 1800, more than 200 more charters had been granted to business corporations, including 38 for roads, 36 for bridges, 28 for banks, 26 for improving navigation, 25 insurance, 21 water-works, 21 canals, 12 manufacturing, 6 for commerce;⁵ and general incorporation laws for certain kinds of corporations (mostly

¹ *Ib.* 41.

² 1 *Doct. Hist. of U. S.* p. 8.

³ Art. I, Sec. viii, par. 3.

⁴ *Centennial Oration*, Washington, Sept. 17, 1887.

⁵ *Two Centuries Growth of American Law; Private Corporations*, by Judge S. R. Baldwin, Yale Bicent. Pub. pp. 275, 296.

charitable or religious) had been enacted in New York,¹ Delaware², and Pennsylvania.³

The Constitution had provided that "No state shall pass any law impairing the obligation of contracts."⁴ In 1782 James Wilson had argued that the charter of the Bank of North America was a compact between the bank and the state of Pennsylvania,⁵ and in 1819, ten years before the steam railroad was born, the Supreme Court in the *Dartmouth College case*,⁶ had held that a corporate charter was a contract between the state and the corporation, protected by this provision. Although it was suggested that the state might retain control over the corporations it created by reserving in their charters a right to amend or repeal, such practice did not become common until many years later. As early as 1821 "the improvident increase of corporations" was looked upon as an evil, "which was restrictive of individual rights," and constitutional provisions requiring two-thirds votes for their creation were made, but were ineffectual.⁷ Finally, between 1830-50, because of "the confusion, corruption, partial, and inequitable legislation that was the result of allowing parties to go before the legislature and ask for a special charter," the bars were almost entirely thrown down by the passing of general incorporation laws in nearly all the states, allowing a few persons in a very simple way to obtain valuable corporate franchises and privileges subject to very slight control and supervision. Since general corporation laws have been passed, and the right to repeal or amend charters has been reserved therein, it has not been an unusual practice for corporations formed under general laws to purchase or obtain control over the charter of some earlier corporation organized under a special act, wherein such right was not retained by the state, and thereby to hold their rights and privileges under a contract the obligation of which the state may not impair. Great numbers of railroads were originally incorporated, or since have reorganized and operate, under special charters.⁸

Thirty years ago so conservative a writer as Judge Cooley observed:—

¹ In 1784.

² In 1787.

³ In 1791.

⁴ Sec. X, Art. I.

⁵ 4 Wheat. 518.

⁷ 2 Kent 271.

⁶ 1 Wilson's Works, pp. 566-7.

⁸ Indus. Com. Rept. Vol. IX, p. 911.

"It is under the protection of the decision of the Dartmouth College case that the most enormous and threatening powers in our country have been created, some of the great and wealthy corporations having greater influence in the country at large, and upon the legislation of the country than the states to which they owe their existence."¹

3. *Power of corporations to engage in interstate commerce.*—By the common law a corporation was considered a *person* within the law, and though perhaps it could not migrate itself, it might, through its agents, do business away from home. The common law had recognized the right to bring a suit in a country other than the one in which it was incorporated.² Such a right was recognized in the Supreme Court of the United States as early as 1809,³ and by the New York courts in 1820,⁴ although such rights had undoubtedly long been exercised before. And in 1839 when the question came before the Supreme Court,⁵ it was expressly held that a bank organized in one state with a general power to discount bills and notes, could exercise such power out of the state, "wherever it was found most convenient and profitable," subject to the laws of the state where exercised; and while it must dwell at home, by the comity of states, it may do business abroad. It soon after became the generally accepted practice and doctrine that a corporation might do business and own property⁶ beyond its borders if its charter did not *forbid*,⁷ or the laws of the state where it undertook to do business did not prevent. From these premises it naturally followed that if a corporation was a *person* having an inherent capacity to do business away from home, and the business done was interstate or foreign commerce over which the states had no control, then such a corporation could engage in that business in any state without the state's consent. Such was implied in *Paul v. Virginia*⁸ in 1868, and held in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,⁹ and in *Crutcher v. Kentucky*,¹⁰ where it was held that one state

¹ Const. Lim. p. 279-80 n. 2d Ed. (1871.)

² *Henriques v. Dutch West India Co.* 2d Ld. Raym. 1532 (1729.)

³ *Bank of U. S. v. Deveaux* 6 Cranch 61.

⁴ *Silver Lake Bank v. North*, 4 Johns. Ch. 370.

⁵ *Bank of Augusta v. Earle*, 13 Pet. 519.

⁶ *Runyan v. Coster*, 14 Pet. 122 (1840); *Thompson v. Waters*, 25 Mich. 214, 12 Am. R. 243 (Reviewing Cases).

⁷ *Merrick v. Van Santvoord*, 34 N. Y. 208 (1866.)

⁸ 8 Wall. 168.

⁹ 96 U. S. 1 (1877.)

¹⁰ 141 U. S. 47 (1891.)

could not "prevent a corporation engaged in interstate commerce from entering that state and carrying on its business therein," the court by *Mr. Justice Bradley*, saying further:—

"To carry on interstate commerce is not a franchise or privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

4. *Inaction of Congress.* As early as 1824, the Supreme Court, overruling the Court of Errors of New York, construed the word *regulate* in the commerce clause to imply full power over the thing to be regulated, and to exclude the actions of all others, while Congress is regulating it; that the power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than such as are prescribed in the Constitution."¹ From this view it naturally followed, as it was afterward acted upon and finally held in 1851² and 1887,³ that

"Where the subject is national in character and admits or requires uniformity of legislation," "*the absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.*"

Congress until very recently has allowed interstate commerce except in minor matters, to go *unregulated* by any action of its own. In 1887 the Interstate Commerce Commission was established, but after continuous and protracted litigation, was emasculated in 1897, into a reporting and recommending body merely, by the decision of the Supreme Court.⁴ In 1890 the anti-trust act was passed and almost immediately in the lower courts⁵ it was held not to apply to combinations of manufacturers, even though their products were made for and entered into interstate trade; and this view was confirmed by the Supreme Court in 1895.⁶ For a period these decisions seemed wholly to defeat the design of the act, but later decisions have in a measure redeemed its efficiency.⁷ The act of last winter establish-

¹ *Gibbons v. Ogden*, 9 Wheat. 1, 1 Kent. Comm. 432.

² *Cooley v. Port Wardens*, 12 How. 299.

³ *Robbins v. Shelby Taxing District*, 120 U. S. 489, 59 Am. R. 267.

⁴ *Interstate Commerce Com. v. Cin. N. O. & T. P. Co.* 167 U. S. 479.

⁵ *U. S. v. Greenhut*, 51 Fed. 205, 213 (1892); *In re Greene*, 52 Fed. 104.

⁶ *U. S. v. E. C. Knight Co.*, 156 U. S. 1.

⁷ *U. S. v. Trans.-Mo. Frt. Assn.* 166 U. S. 290 (1897); *U. S. v. Joint Traffic Association* 171 U. S. 505 (1898); *U. S. v. Addyston Pipe & Steel Co.* 78 Fed. 712, 85 Fed. 271, 175 U. S. 211 (1899); *U. S. v. Northern Securities Co.* 120 Fed. R. 721 (1903.)

ing a Department of Commerce with a Commissioner of Corporations, gives an investigating, reporting, and advisory authority only, and its powers in these particulars are already reported to have been challenged by the Standard Oil Company.

5. The best *summary* I have seen upon the questions involved in this and the preceding section, of the propositions "which have been adjudicated so often as to be no longer open to discussion," with the cases supporting them is that of *Mr. Justice Brewer* in *Atlantic and Pacific Telegraph Co. v. Philadelphia*,¹ as follows:—

First: "The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive wherever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation."

Second: "No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce."

Third: "This immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce."

Fourth: "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States."

Fifth: "No corporation, even though engaged in interstate commerce can appropriate to its own use property, public or private, without liability to charge therefor."

III. *The problem.* 1. *In general* the problem is how to regulate the national commerce of the large state-created corporations. The *actual regulation*, taken from the states by the Constitution, and not exercised by the National Government, has practically passed into the control of state-created corporations, and the question is, shall it be left there without further regulation? Whether or not it should be further regulated is a political and economic question; if it should be further regulated, the manner thereof is largely a *legal* question.

The problem is before us because of the inaction, or inadequate action, of Congress to meet the conditions. In this regard it is analogous to the conditions existing before the National banking law was enacted. The Constitution says "No *state* shall coin money, emit bills of credit, or make anything but gold and silver coin a legal tender in payment of debts."² As early as 1837 it was held that

¹ 190 U. S. 160, on 162 (1902.)

² Art. I. Sec. X, cl. 1.

while the states could not issue money, they could create a corporation and give it the power to issue money (not making it a legal tender),¹ and straightway we had as bad a currency as ever afflicted a suffering people. Congress had the power to coin money and regulate the value thereof,² but had failed to establish a sufficient and uniform currency. So far as the currency could be said to be *regulated*, at all, it was practically *relegated* to the private interests of 1600 "Wild cat banks," created in the several states, with an infinite variety of special powers, under charters largely "based on ignorance, intrigue, favoritism, or corruption," without uniformity of creation, management, operation, liability, responsibility, or regulation, and issuing 10,000 different kinds of notes. So far as a national currency is concerned there was no adequate provision for one until the National banking act³ was passed, and no uniform one until the state bank issues were taxed out of existence in 1865.

2. *Concentration of control.* Our commercial condition is, similarly, an unregulated corporate regulation, with the addition that the control of the main forces and instruments of commerce is now vested or centered in a few state created corporations that have become *federal in operation, federated in organization, and imperial in power.*

General Garfield thus characterized the situation thirty years ago:

"The vast railroad and telegraph systems have virtually passed from the control of the States. . . . The efforts of the States to regulate their railroads have amounted to but little more than feeble annoyance. In many cases the corporations have treated such efforts as impertinent intermeddling. . . . In these contests the corporations have become conscious of their strength, and have entered upon the work of controlling the states."⁴

If this was true in 1873, how much more cause for concern, and need of adequate regulation, are there arising from the development since? Prior to 1870, scarcely any railroad system was over 1000 miles in length,—consolidation and effective pooling had only fairly begun; between 1870 and 1890, railroad systems were formed controlling 5000 miles; between 1890 and 1898, single systems of 10000 miles or over were formed, and now the five principal systems aggregate nearly 150,000 of the total 200,000 miles of railroad in this country. In 1900 one-fourth of all the railroad shares were

¹ *Briscoe v. Bank*, 11 Pet. 257.

² Art. I, Sec. VIII. cl. 5.

³ Acts, Feby. 25, 1863, and June 3, 1864.

⁴ *The Future of the Republic*, J. A. Garfield. 2 Works, p. 61.

held by other railroad companies, and undoubtedly this has greatly increased since. A late authority says that 19 railroad systems, practically controlled by nine men closely associated in various ways, operate 165,321 miles, or nearly 81 per cent of all the railroad mileage in the country.¹

Concentration in the *industrial* and *financial* fields has been even more rapid. It has been stated that between 1860 and 1870 only *two* "industrial trusts" formed by combination of formerly competing concerns, were created with a total capitalization of \$13,000,000; between 1870 and 1880, *four* more were formed with \$135,000,000 nominal capital; between 1880 and 1890, *eighteen* more were formed with \$228,000,000; and according to the last census there were then 183 combinations with a capitalization of \$3,619,039,200; in 1902, there were said to be 213 combinations, with nearly \$7,000,000,000 capitalization, while a later authority says there are 850 industrial combinations not including railroad mergers, with a nominal capitalization of \$9,000,000,000. These vast sums are not the most important point; the concentration of control is still more important. This has already been noted as to railroads. It has been said:—

"The property which the Amalgamated Copper Company now controls was once perhaps a thousand mining claims. . . It is estimated that the Standard Oil Company has taken, by contract or by force the business of ten thousand corporations and merchants in all parts of the Union."²

The estimated wealth of the United States, according to the census of 1900, was \$94,300,000,000. The control of a sum nominally equal to one-twelfth of this is represented by the 24 directors of the United States Steel Corporation; they are, also, the influential directors in more than 200 companies that operate half the railroad mileage of the country; dig and carry the iron and coal; control the greatest oil, copper, sleeping car, telegraph, express, agricultural implement, bridge, traction and shipping interests in the country; also the five greatest insurance companies, nine of the greatest banks, and sixteen of the largest trust companies with their large chains of affiliated banks and trust companies, throughout the country. This group of men controls corporations with a nominal capitalization of \$9,000,000,000; and of the 24, two, Mr. Morgan and Mr. Rockefeller, are said virtually to control eight out of the nine billions.³

¹ S. S. Pratt, in *World's Work*, Dec. 1903, p. 4262.

² Report of Com. on Commercial Law, Am. Bar. Assn. 1903, p. 6; *Am. Law. Rev.* Nov.-Dec. 1903, p. 828.

³ See Article in *World's Work* for Dec. 1903, Who owns the United States?

3. *Extent of operations.* Not only is concentration of control important, but the extent of operations is of great significance. The Standard Oil wagon is seen in nearly every city, village, and hamlet in the land, and its operations extend around the world. The 213 or more separate plants of the United States Steel Corporation are located and operated in nearly half the states, and its trade invades the markets of the world. And so with many others. As Mr. Dill says:—

“The trusts today are a force and power national in extent. National in extent in that their business not only extends throughout all of the original and acquired territory of this country, but is rapidly over-leaping the boundaries of our States and possessions, entering into foreign countries and making rapid inroads into foreign markets; and national in extent also in that their financial roots extend down and into every commonwealth and municipality of this country.”¹

4. *Form of organization.* The great aggregation of wealth represented, the extraordinary concentration of its control, and the vast extent of the operation, are not more material than is the affiliated and federated form of organization. Through the interholdings of corporation shares, interests of the greatest diversity are held and controlled in harmony; and through the method of the *holding corporation* is susceptible of unlimited extent, concentration, and duration. There are now not only combinations of combinations, but corporations of corporations, joined in a federal union, that can act with the speed, the certainty, the vigor, and the effect of a monarchy, and under the laws of many states where they are or may be formed, with less responsibility to their constituents and to the public than any constitutional monarch in the world. The order of the Standard Oil Co., or of the United States Steel Corporation, and of many others, as to the prices of their products or of the raw material they use, act with a directness and rapidity greater and affect a larger territory in a shorter time, and without warning, than the act of any legislature in the world.

5. *Laxity of state laws.* Under present laws in several states the directors may provide, in the organization of the corporation, for no effective control over their acts, liabilities, or operations by the members, and the laws of such states provide no public control of consequence outside of taxation. Most of these great corporations have been organized under the same laws as the United States Ship-building Co., or laws not even as strict as they are, and allow of

¹ Address, National Incorp. Laws for Trusts, Harv. Univ. March 1902.

the same unbridled effrontery, speculation, peculation, and fraudulent promotion that seem to have taken place there, and without certain and adequate remedy to the sufferers. The shares of corporations organized under the same laws, and with no more protection, are widely scattered over the land, and if like transactions have not occurred, or do not occur, in many other cases it will not be because the laws are adequate to prevent them. As a hotel man recently said in New York the shares are *insecurities* rather than anything else, and many a one finds himself in the same predicament as he,—“I have made my pile, and it is safely invested in Steel Common, Amalgamated Copper, and Shipbuilding securities, and nobody can take it away from me,”—or wont.

6. *Diversity of state laws.* The great diversity of state laws under which corporations may be formed, confuse the investor, and often mislead him to believe there is safety where there is none. The vast variety of these laws, and in many cases the uncertainty of their provisions, make a jungle of confusion wherein the dishonest promoter or manager finds safety.

Aside from this, many states, by liberalizing their laws, so as to induce corporations to incorporate within their borders, for the revenue derived from the fees, have made it possible to get a charter where there is

“No franchise tax; no limit on capitalization; no amount of stock required to be subscribed; no state control, no examination of books; stock non-assessable; keep office any where; do business any where.”

Some of the states make a business of spawning spurious corporations to infest other states, than the one in which they are incorporated, with their nefarious practices and progeny.

7. *Methods used to build up trusts.* The methods whereby these institutions have been built up must also be considered. From the investigations of our various commissions during the past twenty years it has been made certain that the particular devices used in most cases, which have brought the problem before us in the condition above pointed out, have been mainly four: (1) The acquisition, practically, of monopoly power either by grant of franchises of various kinds, or through *discrimination* in transportation charges; (2) The destruction of legitimate competition by the *predatory competition* of the holders of monopoly power; (3) The *overcapitalization* of corporations; and (4) *Dishonest and irresponsible corporate promotion and management.* The first three have been usual, and the last not infrequent. The first three have hardly been unequi-

vocally denied, and the 2d and 3d generally defended as justifiable, by those benefiting by them. There is, however, almost no doubt that the first two destroy the independent and honorable business of vast numbers of honorable and competent business men. Of course it is also said that the consumer is benefited by lower prices; but such statements are not generally believed or found to be correct. That illuminating oil goes up, and crude goes down, in price,—and dividends get larger, is not an unusual experience. The first three make, or give the power to make, all consumers pay tribute into the coffers of those whose will fixes the price as their interest dictates; and the last two enable the unscrupulous to shear the lambs,—and if greatly successful in these various and devious ways are frequently looked upon as economically righteous.

8. *Effect, or the danger threatened.* Judge Walton of the Supreme Judicial Court of Maine has pertinently observed that:—

“Men are mortal, and their combinations short lived, but corporations are immortal and their combinations and acquisitions may go on forever; they may add field to field, wealth to wealth, and power to power, till they become too strong for the government itself; all experience shows that such accumulations of wealth and power are dangerous to the public welfare.”¹

Any person, with no inclination to see imaginary dangers, is, nevertheless, instinctively led, or reluctantly driven, to ask if we are approaching the condition of universal monopoly of which Fourier wrote nearly one hundred years ago:

“The organization of the commercial classes into federal companies, or affiliated monopolies. . will reduce the middle and laboring classes to a state of commercial vassalage. . And we shall see the reappearance of feudalism.”

Without in the least forgetting the value of corporate organizations, and their necessity in our business life; without denying there can be great benefit derived from the nationalization rather than the localization of our industries; and admitting that concentration of control and management may result in great savings in production and distribution,—and believing that if all these are honestly and honorably done, they may be made to promote the general welfare,—yet, if our diagnosis is correct, the fact remains, that the National Government does not, the states cannot, and the corporations do, control our industries,—but not “in order to promote the general welfare.” As was said in the *Addyston Steel Co. case*, private contracts between such corporations “may in truth

¹ *Brunswick G. I. Co. v. United Gas Co.*, 85 Me. 532, 35 Am. St. R. 385, 387 (1893).

be as far-reaching in their effect upon interstate commerce as would the legislation of a single state of the same character."¹

IV. *Power to control our commerce and corporations: 1. In general.* If the predicament we are in is due to unregulated commerce, and the inadequate control of the corporations carrying it on, we should get relief by proper regulation of both; but the two are so related that attempts to regulate one without the other, or for one government to try to regulate the commerce, and forty-five different governments undertake to regulate the corporations that carry it on, will inevitably result in failure. As we have seen, the particular devices whereby evil is wrought or danger threatened are unjust discriminations in transportation, predatory competition, over-capitalization, and dishonest corporate management,—the first two are matters of commerce, and the last two of corporation law,—and though, separable in the mind, they are inextricably bound together in fact. Nothing less than one system of regulation that can reach all can be successful. Where is the power to do this?

2. *Power of the states:* As to the commerce which has become national in extent, from what has already been said, it is clear this is beyond the powers of the states, first, because the Constitution has taken away the power, and second, because if they had it, it would be impossible to secure the necessary uniformity of regulation to be efficient or desirable.

By the decisions, a state cannot exclude a corporation engaged in interstate commerce,² nor tax such commerce,³ even if the corporation is one of its own creation,⁴ nor tax the agents engaged in it,⁵ nor fix the rates for carrying it,⁶ nor exclude articles of such commerce,⁷ or persons coming into,⁸ or going out of the state.⁹

To secure the uniformity of regulations was the reason the power to regulate national commerce was given to Congress, and it is idle to consider that uniformity will ever be attained by leaving, or further surrendering, this power to the states, as has been suggested.

¹ Addyston Pipe & Steel Co. v. 175 U. S. 211 (1899).

² Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; Cooper v. Ferguson, 113 U. S. 727.

³ Brown v. Maryland, 12 Wheat. 419.

⁴ Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326.

⁵ Robbins v. Taxing District, 120 U. S. 489.

⁶ Wabash R'y Co. v. Illinois, 118 U. S. 557.

⁷ Bowman v. Chicago & N. W. Ry., 125 U. S. 465; Collins v. New Hampshire, 171 U. S. 30.

⁸ Chy Lung v. Freeman, 92 U. S. 275.

⁹ Crandall v. Nevada, 6 Wall. 35 (1867).

As to regulating the corporations created by the states, it would seem that a state could control its own corporations, and exclude the foreign corporation,—but the very corporation to be controlled is the one that carries on national commerce,—and this takes it out of any effective control, at least when organized in another state.

But aside from these considerations many of the great corporations are so big and powerful as to make it practically impossible to secure adequate control, if the legal authority existed. The *net earnings* of the United States Steel Corporation for 1902, were over \$133,000,000,—more than the total sum raised by taxation in New York and Ohio, together, in 1898, and twice the amount raised by tax in Pennsylvania the same year. The gross income of the same corporation for 1902, \$565,000,000, was more than the total ordinary receipts of the National Government for any year prior to 1899. Its stock and bonds are more than the total capital engaged in manufacture in any state of the Union, except New York and Pennsylvania; and likewise the same are greater than the value of all the farm products of any state except Illinois and Iowa. If Judge Grosscup could have been induced to act as attorney for the Northern Securities Company, in the Supreme Court, and been successful in its defense, the company could easily afford to pay him a fee, the interest of which would bring him for life a greater return than his salary as a United States judge. “The only possible competitor for a billion dollar trust is a hundred billion dollar State.”¹

But the diversity of the laws under which state commercial corporations are or may be formed is as great as the diversity of the commercial regulations of the states was before the Constitution was formed, and has similar effects.

These corporate bodies owe their existence to the different laws of the different states. Wherever they may do business or seek members, all questions relating to the organization, amendment, internal control and regulation, rights, duties and liabilities of members and officers, issue, payment, and transfer of shares, duration, dissolution, and winding-up, are determined by the law of the state where organized, though the members may reside in every state in the Union. Every contract made, wherever made, is subject to the provisions of the charter, which every person who deals with the corporation is presumed to know. The operations of the corporation and its public rights and duties are determined both by

¹ Report Com. Am. Bar Assn., 1903, p. 18.

charter provisions, and by the law where the transaction occurs. On such a question as to what duty there is, and the extent of it, to receive and transport safely freight from one state to another, there are seven different views.¹

This is a sample of the variety of views upon many questions. The corporate property and shares are usually subject to as many different methods of valuation and taxation, as there are states in which they are located, and in the case of intangible property and shares are not infrequently subject to double, triple or quadruple taxation. Reports and fees required, and terms and conditions of the police control are as diverse as the places in which business is done. Every session of the legislature in each of the forty-five states, and many of the decisions of the courts of last resort, tend to increase, rather than diminish, the diversity. Those who wish to engage in productive industry, not of a purely local character, and in an honorable way, are inordinately inconvenienced and unduly hampered by the conflicting provisions of the state laws. The policy of the states will never be in harmony. Situation, local pride, political bias, party policy, peculiar industries, or financial interest will produce and increase the differences.

3. *National power.* If state power is too weak for effective regulation, what power has the National Government, over national commerce and over the corporations carrying it on?

As to commerce. Mr. Justice Harlan, in the *Lottery Case*,² cautiously said:—

"The whole subject is too important, and the questions suggested by its consideration are too difficult of solution to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause."

Nevertheless, after an extensive review of the cases from *Gibbons v. Ogden*³ to *Hanley v. Kansas City Southern Ry.*,⁴ he concludes that "Congress alone has the power to occupy, by legislation, the whole field of interstate commerce," and as stated *In re Rahrer*,⁵ "The framers of the Constitution never intended that the legislative power of the Nation should find itself incapable of disposing of a subject specifically committed to its charge," and points out that

"Commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by

¹ *Origin of Right to Engage in Interstate Commerce*, E. P. Prentice, Harv. L. R., Nov., 1903, p. 32.

² 188 U. S. 321 (1903).

³ 9 Wheat. 1 (1824).

⁴ 187 U. S. 617

⁵ 140 U. S. 545.

telegraph. . . . The power to regulate commerce among the several states is vested in Congress as *absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*"

Commerce includes the *subject-matter* of traffic and intercourse, the *fact* of traffic and intercourse, and the *instrumentalities* by which it is carried on.

The *subject-matter* may be "things, goods, chattels, merchandise, or persons."¹

The *fact of intercourse* includes the negotiation of the *sale* of goods which are in other states whether by solicitor or sample,² the *purchase* of goods between citizens of different states, made in either state,³ communication between persons by the transmission of intelligence by telegraph⁴ or telephone,⁵ the transit of persons,⁶ or the transportation of persons or property,⁷ by express,⁸ or piping⁹ of oil or gas,⁹ or driving of cattle,¹⁰ in completion of a commercial transaction across state lines, and also the written documents¹¹ whereby such transactions are effected.

As to the *instrumentalities*, Chief Justice Waite said in *Pensacola Tel. Co. v. Western Union Telegraph Co.*:¹²—

"Postoffices and postroads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, *because being national in their operation*, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new devel-

¹ *McCall v. California*, 136 U. S. 104; *Lottery Case*, 188 U. S. 321 (1903).

² *Cooper v. Ferguson*, 113 U. S. 727 (1885); *Robbins v. Taxing District*, 120 U. S. 489, 59 Am. R. 267 (1887); *U. S. v. E. C. Knight Co.*, 156 U. S. 1 (1895); *Hopkins v. U. S.* 171 U. S. 578 (1898); *Addyston Pipe Co. v. U. S.* 175 U. S. 211 (1899).

³ Same cases as preceding note. *McNaughton v. McGirl*, 20 Mont. 124, 63 Am. St. R. 610 (1897).

⁴ *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1 (1877); *Western Union Tel. Co. v. Pendleton* 122, U. S. 347.

⁵ *Matter of Pennsylvania Tel. Co.*, 48 N. J. Eq. 91, 27 Am. St. R. 462.

⁶ *Passenger Cases*, 7 How. 283 (1848); *Crandall v. Nevada*, 6 Wall. 35 (1867); *People v. Compagnie Generale*, 107 U. S. 59; *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, 218.

⁷ *The Daniel Ball*, 10 Wall. 557 (1870); *State Freight Tax Cases*, 15 Wall. 232 (1872); *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887).

⁸ *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

⁹ *State v. Indiana etc. Co.*, 120 Ind. 575 (1889).

¹⁰ *Kelley v. Rhoads*, 188 U. S. 1 (1903).

¹¹ *Almy v. California*, 24 How. 169; *Fairbanks v. U. S.* 181 U. S. 283.

¹² 96 U. S. 1, 9, 12.

opments of time and circumstances. *They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph,* as these new agencies are successively brought into use to meet the demands of increasing population and wealth. *They were intended for the government of the business to which they relate at all times and under all circumstances.'*

Exactly when such commerce begins and ends is a difficult question. The production or manufacture¹ of things intended for interstate commerce, or gathering them together for the purpose of sending them to other states,² or after sending them into another state, keeping them there for the purpose of use or sale,³ if not in the original package,⁴ is not interstate commerce.

Insurance,⁵ loaning money,⁶ dealing in foreign lands,⁷ dealing in bills of exchange,⁸ carrying on building and loan associations,⁹ mining,¹⁰ or carrying on the business of brokers or commission merchants,¹¹ is not interstate commerce so far as to prevent state regulation, or within the present anti-trust act.

Under the power to *regulate*, the question naturally arises as to how far Congress can *prohibit* interstate commerce. It has been said that

(1) "The power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations,"¹² or with the Indian tribes, it might have been added. (2) "The Federal power of commercial regulation includes necessarily a power of police supervision."¹³ (3) "The power to regulate commerce may be used for the promotion of¹⁴ other objects of national concern," as excluding and deporting foreigners. And finally, (4) The constitutional amendments that forbid a person from being deprived of life, liberty or property do

¹ *U. S. v. E. C. Knight Co.*, 156 U. S. 1 (1895).

² *Coe v. Errol*, 116 U. S. 517 (1886); *Diamond Match Co. v. Ontonagon*, 188 U. S. 82 (1903).

³ *Brown v. Houston*, 114 U. S. 622.

⁴ *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1897); *May v. New Orleans*, 178 U. S. 496 (1900).

⁵ *Paul v. Virginia*, 8 Wall 168; *Hooper v. California*, 155 U. S. 648 (1894).

⁶ *Nelms v. Mortgage Co.* 92 Ala. 157.

⁷ *Honduras Com. Co. v. State Board*, 54 N. J. L. 278.

⁸ *Bamberger v. Schoolfield*, 160 U. S. 149.

⁹ *Southern Building and L. Assn. v. Norman*, 98 Ky. 294.

¹⁰ *Utley v. Gardner Lode Min. Co.*, 4 Col. 369.

¹¹ *U. S. v. Hopkins*, 171 U. S. 578 (1898).

¹² *Brown v. Houston*, 114 U. S. 622, 630,—Mr. Justice Bradley; *Pittsburgh Coal Co. v. Bates*, 156 U. S. 577, 587.

¹³ *Prentice & Egan, The Commerce Clause*, p. 337.

¹⁴ *U. S. v. Williams*, 83 Fed. 997; *Fong Yue Ting v. U. S.* 149 U. S. 698.

not limit, but are "to some extent, limited by the commerce clause of the Constitution."¹

As to *foreign* commerce, Hamilton says:—

"Every person, by the common law of each state may export his property to foreign countries, at pleasure. But Congress in pursuance of the power of regulating trade may *prohibit* the exportation of commodities."²

And it was held in 1808, and hardly questioned since, that Congress might establish an absolute embargo for an indefinite duration.³ The raising of revenue by means of customs tariffs, was, at the time the Constitution was framed, considered as much a method of *regulating* commerce, as of obtaining a revenue, and a *protective* tariff can be based upon no other constitutional provision than "in order to promote the general welfare," not by the revenue obtained, but by the effect on commerce. And this is the basis upon which it has been placed.⁴ Under the tariff laws, the importation of many "proper articles of commerce," have been excluded or practically prohibited by high duties. Finally the constitutional convention seemed to think the power to *regulate* foreign commerce would include the power to *prohibit* the slave trade prior to 1808, unless it was expressly excepted.

It has been held that Congress may prohibit the sale of intoxicating liquors, or deleterious articles to the Indian tribes.⁵

In the regulation of interstate commerce it has also been held that Congress may prohibit combinations,⁶ or contracts⁷ in direct restraint thereof, or the transportation or introduction of diseased live stock into one state from another.⁸ Although distilled liquors are "lawful articles of commerce,"⁹ yet Congress can make them subject to the *prohibitory* laws of the state into which they have been shipped for sale from another¹⁰ state. And finally Congress can prohibit the carriage of lottery tickets into one state from

¹ *Addyston Pipe Co. v. U. S.* 175 U. S. 211; *State v. Firemen's Fund Ins. Co.* 152 Mo. 1; *State v. Buckeye Pipe L. Co.* 61 O. S. 520; *State v. Smiley*, 65 Kan. 240, 69 Pac. 199 (1902).

² *Argument on a National Bank*, Ford's *Federalist*, p. 662.

³ *U. S. v. Brigantine William*, 2 Hall L. J. 255 (1808), 2 Kent, Com. 432.

⁴ *Story on the Constitution*, § 963.

⁵ *U. S. Holliday*, 3 Wall, 407; *U. S. v. Mayrand*, 154 U. S. 552.

⁶ *U. S. v. Trans-Missouri Frt. Assn.* 166 U. S. 290 (1897); *U. S. Joint-Traffic Assn.*, 171 U. S. 505 (1898).

⁷ *U. S. v. Addyston Pipe Co.*, 175 U. S. 211 (1899).

⁸ *Reid v. Colorado*, 187 U. S. 137 (1902).

⁹ *Bowman v. Chicago, etc. Ry. Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100.

¹⁰ *In re Rahrer*, 140 U. S. 545; *Vance v. Vandercook*, 170 U. S. 438.

another,¹ or sending letters or circulars relating to lotteries through the mails.² *State laws* forbidding the introduction of convict made goods,³ or *regulating* interstate passengers,⁴ or forbidding the introduction of articles proper for commerce,⁵ are void because they infringe upon the exclusive power of Congress to regulate commerce.

In addition to the foregoing, Congress has forbidden the transportation of negroes into a state,⁶ or the carrying or sending of any literature, picture, or article designed for indecent or immoral use,⁷ or convict made goods,⁸ or to transport the dead bodies of wild animals or birds killed in violation of the laws of the state where the attempt is made.⁹

All the foregoing are so closely allied to a *police power* in the United States, based on the commerce clause as to be practically indistinguishable from it, and if, as said above, the commerce clause gives to the National Government the same power that a state government would have with the same constitutional provisions, it would follow that any regulation made by Congress, not merely for the purpose of evading other constitutional provisions, would be beyond the authority of the courts to declare void. The necessity and wisdom of such a regulation are for Congress to determine.¹⁰

While it may be questionable whether Congress could prohibit interstate commerce altogether,¹¹ (although this was done during the Civil War as to the seceding states),¹² yet there can scarcely be a doubt that *regulate* includes making and enforcing the rule and conditions under which commerce may be carried on, as the public welfare demands, and forbidding it being done otherwise.¹³ There is nothing in this view inconsistent with the proper exercise of the state police powers,¹⁴ or with the liberty of citizens.

¹ Lottery Case, 188 U. S. 321 (1903).

² *In re Rapier*, 143 U. S. 110.

³ *People v. Hawkins*, 157 N. Y. 1.

⁴ *Hall v. De Cuir*, 95 U. S. 485.

⁵ *Brimmer v. Rebman*, 138 U. S. 78.

⁶ 2 U. S. Stat. at L. 205 (1803).

⁷ Act Feb'y 8, 1897, c. 172, 29 Stat. at L. 512 ⁸ Act of July 24, 1897, 30 Stat. at L. 211 § 31.

⁹ Act May 25, 1900, 31 Stat. at L. 187, § 3. ¹⁰ *Gibbons v. Ogden*, 9 Wheat. 1.

¹¹ Dissenting opinion of Chief Justice Fuller, in Lottery Case, 188 U. S. 321. The dissent however, is based as much upon the view that a lottery ticket was not a subject of commerce, as held by the majority of the court.

¹² Act of July 13, 1861, 12 Stat. at L. 247, R. S. § 5301.

¹³ *Gibbons v. Ogden*, 9 Wheat 1, 196.

¹⁴ *Hennington v. Georgia*, 163 U. S. 299; *New York etc. R.R. v. New York*, 165 U. S. 628; *Lake Shore & M. S. Ry. v. Ohio*, 173 U. S. 285.

As to corporations. The next point for consideration is what power has Congress to establish *corporations* to engage in interstate commerce.

Although by the Articles of Confederation, Congress had no power except such as was *expressly* delegated to it, yet within three months after these Articles went into effect, the Congress of the Confederation approved a proposition to incorporate a national bank, and December 31, 1781, proceeded to institute and incorporate the Bank of North America.¹ The power to do this was hardly questioned. Later, in defense of the bank, James Wilson, in 1782, laid down the doctrine of implied constitutional powers in the following words: "*Whenever an object occurs, to the direction of which no particular state is competent*, the management of it must, of necessity, belong to the United States in Congress assembled."² In the Constitutional Convention of 1787, Mr. Madison twice moved that Congress have power "To grant charters of corporations in cases where the public good may require them and the authority of a single state may be incompetent."³ It was rejected partly because it was unnecessary,⁴ and might lead to creation of monopolies.⁵ Mr. Wilson thought it necessary *to prevent a state from obstructing the general welfare*, and observed that mercantile monopolies "are already included in the power to regulate trade."⁶ Mr. Gerry refused to sign the final report because, (among other things), "under the power over commerce, monopolies may be established."⁷ In 1791, upon the recommendation of Mr. Hamilton, Congress chartered the Bank of the United States. The constitutionality of the bill to establish it was attacked in the House of Representatives, and President Washington, after taking the written opinions of the Attorney-General, Randolph, the Secretary of State, Jefferson, (both of whom opposed it), and of the Secretary of the Treasury, Hamilton, signed the bill.⁸ These opinions are classic on the subject of the implied powers of the government. Among other things Hamilton argued:—

¹ 2 Kent, Comm. 254; 1 Wilson's Works, p. 549.

² 1 Wilson's Works, p. 558.

³ Journal of Conv. (Aug. 18), p. 549; (Sept. 14), p. 725; the wording in the last case was:—"To grant charters of incorporation where the interest of the United States might require, and the legislative provisions of individual states may be incompetent.

⁴ Mr. King, Journal Conv. p, 726.

⁵ Mr. King and Mr. Mason, *Ib.*

⁶ *Ib.*

⁷ *Ib.* p, 740.

⁸ 1 Stat. at L, 191; 2 Kent, Comm. 248.

Congress may create a corporation in relation "to the trade with foreign countries, or to the trade between the states, or with the Indian tribes; because it is the province of the federal government to *regulate* those objects, and because it is incident to a general *sovereign* or *legislative* power to *regulate* a thing, to employ all the means which relate to its regulation to the best and greatest advantage."¹ And further, "Suppose a new and unexplored branch of trade should present itself with some foreign country, suppose it was manifest that to undertake it with advantage required a union of capitals of a number of individuals, . . . what reason can there be to doubt that the National Government would have a constitutional right to institute and incorporate such a company? None. They possess a general authority to regulate trade with foreign countries. This is a means which has been practiced to that end, by all the principal commercial nations, who have *trading* companies to this day which have subsisted for centuries. . . . A power to regulate trade, is a power to make all needful rules and regulations concerning trade. Why may it not, then, include that of erecting a trading company? . . . It is remarkable that the state conventions, who had proposed amendments in relation to this point, have most, if not all of them, expressed themselves nearly thus: Congress shall not *grant monopolies, nor erect any company with exclusive advantages of commerce*. Thus at the same time expressing their sense that the power to erect *trading companies* or corporations was inherent in Congress, and objecting to it no further than as to the grant of exclusive privileges."²

Distinctions that are yet important were drawn as clearly in these great arguments as they ever have been since. Mr. Hamilton had argued that the establishment of a bank had a natural relation to the regulation of trade by creating a convenient and adequate medium of exchange to carry on commerce. Mr. Jefferson on this point said:—

"To erect a bank, and to regulate commerce are very different acts. He who erects a bank, creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides, if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every state, (that is to say the commerce between citizen and citizen), as to its external (that is to say its commerce with another state, or with foreign nations, or with the Indian tribes)."³

This is the exact distinction made in the sugar trust case in 1895.⁴

The charter of the bank expired in 1811, when the opposition was in power and its charter was not renewed. A new bank was, how-

¹ Argument of Hamilton, Ford's Ed. of Federalist, p. 657.

² Hamilton's Argument, Ford's Federalist, p. 676.

³ Jefferson's Argument, Ford's Federalist, p. 652.

⁴ U. S. v. E. C. Knight Co., 156 U. S. 1.

ever, chartered¹ with similar powers in 1816. The act establishing it was signed by Madison, and its constitutionality was brought before the Supreme Court in 1819, and sustained by the decision² of Chief Justice Marshall, along the lines of the arguments made by Mr. Wilson in regard to the Bank of North America, and Mr. Hamilton as to the first United States Bank. Since this decision it has not been doubted that,

"Congress may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states."³

Early in the century Congress authorized the construction of the National road from the Potomac to the Ohio rivers;⁴ and Congress has authorized the incorporation of the present National banks⁵, the Union Pacific,⁶ Northern Pacific,⁷ Atlantic and Pacific,⁸ and the Texas and Pacific⁹ railways; the Maritime Canal Co. of Nicaragua,¹⁰ various bridge companies,¹¹ and National Trades Unions;¹² state incorporated telegraph companies have been authorized to construct their lines on all post-roads, even where a state had granted to another company the exclusive right to construct such line,¹³ and all railroads are made post-roads for such purposes.¹⁴

In *California v. Pacific Railroad Co.*¹⁵ it was specifically held that Congress has authority in the exercise of its powers to regulate commerce among the several states to construct or to authorize individuals or corporations to construct national highways and railroads across the states as well as the territories of the United States, and bridges from state to state. As Mr. Justice Bradley said:—

¹ 3 Stat. at L., 266.

² *McCulloch v. Maryland*, 4 Wheat. 316; *Osborne v. Bank of U. S.*, 9 Wheat. 738.

³ *Luxton v. North River Bridge Co.*, 153 U. S. 525 (1894).

⁴ *Indiana v. U. S.* 148 U. S. 148.

⁵ 12 Stat. at L. 665 (1862).

⁶ 12 Stat. at L. 489 (1862).

⁷ 13 Stat. at L. 365 (1864).

⁸ 14 Stat. at L. 292 (1866).

⁹ 17 Stat. at L. 59 (1872).

¹⁰ 25 Stat. at L. 673 (1889).

¹¹ *As North River Bridge Co.*, July 11, 1890, 153 U. S. 525.

¹² 24 Stat. at L. 86 (1886).

Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1 (1877).

Rev. Stat. § 3964; 17 Stat. at L. 308, § 201.

127 U. S. 1 (1887).

"Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. . . . Congress has plenary power over the whole subject."

Such a national corporation may exercise the power of eminent domain within the states if so authorized, without the state's consent,¹ it is exempt from state control or taxation so far as the same might impair its efficiency as an instrument for carrying on the purposes for which organized,² and has the right to sue in the United States courts.³ The national constitutional provision forbidding "impairing the obligation of contracts" does not specifically apply to Congress, although the provisions of the fifth amendment,—that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation,"—do apply.⁴

The authority of Congress to create corporations in the District of Columbia, and in the Territories, and to exercise control over them has never been doubted, and is as extensive as is the power of the legislature of any state to create corporations within the state.⁵ Such corporation may be empowered by state comity, to act outside of the District or territory in which it is located,⁶ but it cannot, though empowered to do so, act in another state without that state's consent⁷ unless it is engaged in the performance of some national function.

From the foregoing it seems certain that the power of the National Government is ample to enable it to create whatever transmission, transportation, or trading corporations, to engage in interstate commerce, that it may deem wise to establish. But is this sufficient? The combinations of which complaint is made are not only engaged in the foregoing but in *growing, mining, or making* things, and neither of these is commerce. Can the National Government incorporate companies to do these things within the states? The answer is difficult, but probably the government cannot do so if that is the

¹ Kohl v. U. S. 91 U. S. 367 (1875); Luxton v. North River Bridge Co., 153 U. S. 525 (1894).

² National Bank v. Commonwealth, 9 Wall. 353 (1869); Railroad Co. v. Peniston, 18 Wall. 5 (1873); Farmers & M. Natl. Bank v. Dearing, 91 U. S. 29; Easton v. Iowa, 188 U. S. 220 (1903).

³ Texas etc. R. Co. v. Cody, 166 U. S. 606 (1897).

⁴ Corporation of Jesus Christ v. U. S., 136 U. S. 1 (1890); U. S. v. Union Pacific Ry., 98 U. S. 569 (1878); Sinking Fund Cases, 99 U. S. 700.

⁵ Huntington v. Savings Banks, 96 U. S. 388; Hadley v. Freedman's Savings, etc. Co., 2 Tenn. Ch. 122 (1874).

⁶ Daly v. Natl. Life Ins. Co., 64 Ind. 1.

⁷ Stoutenburgh v. Hennick, 129 U. S. 141.

primary or sole purpose for which the corporation is created, and the state in which it seeks to carry on its transactions objects, and it is not desirable to clothe the National Government with such power. A constitutional amendment proposing to give to the National Government power to create a corporation, or authorize a state-created corporation, for private business purposes to go into a state and against its consent to establish and operate a manufacturing plant there, I believe would and ought to be resented by every state. But no such power or authority is needed. If the government *can obtain control over the corporations* that do the *growing, mining or making* of things, it will have ample power to solve our difficulties; but if it cannot obtain this control in a way to exercise it directly and unequivocally, then it is doubtful if the national arm is long and strong enough to extricate us from our perils.

As things now are the manufacturing companies do the trading; the National Government has control of the *trading*, but neither the *manufacturing*, nor the company that does it; if the process can be reversed, so that the *trading company*, incorporated by the National Government, will do the manufacturing, then both the *trading* and the *company* doing it, can be directly controlled, and the manufacturing, also, incidentally, so far as the *regulation* of commerce may make necessary. It is believed this is enough, and nothing else is.

The question is, then, can a National transmission, transportation, or trading company, be *authorized* to engage in growing, mining, or making things,—in the states, if they do not object? I think so: (1) Because making or producing things is incidental or necessary to each of the other operations. A railroad company would have the right to repair its cars, and nearly every such company has extensive shops for repairing and constructing its cars; and if they can *construct* for any purpose, they can be given the right to sell, at least outside the state. (2) Such has been the practice already. All the Pacific railroads were authorized to carry *intra* as well as *inter*-state freight; National banks do an ordinary private loan and discount business as well as issue notes; the Union and Central Pacific charters permitted them to *mine* coal for their supply, then in the territories, but since in the states through which they pass; the Maritime Canal Company is authorized to construct and operate a canal, in a place where the United States has no jurisdiction. (3) If the states can give authority to do such things away from home, which by comity is sufficient for the company, there seems to be no reason to think a federal corporation cannot

be given the same power, which will also be effective through the comity of the state where exercised. (4) Now a federal corporation may be created in the District of Columbia or a territory to carry on a manufacturing business there; such a corporation, if its charter does not *forbid*, may by comity engage in such manufacture in any state, the same as a state-created corporation; the fact that the National Government also expressly authorized it to engage in interstate trade or transportation would not limit its power, by comity, to carry on its manufacture wherever it was not forbidden. (5) But the power to engage in trade or transportation necessarily implies the power to secure something to trade or transport; the National Government may authorize such a company to acquire these things by contracts of purchase and sale, in any state; if a trading company can buy the things in which it deals, there is no good reason why its charter may not allow it to make the thing it trades in if the state where it does this, does not object. So I believe that if the National Government can create a *trading* company, the Nation, in the charter, and the states by comity, can and will allow it to do manufacturing in any state. There seems to be no direct authority on the matter, but what there is leans that way. Such *intra*-state business probably is, and would be, subject to state laws.¹

Taxing power: The National Government also has at its command the *taxing* power; if *direct* taxes are levied they must be apportioned according to population,² if indirect they need not be so,³ but must be uniform throughout the country; it can reach the property and transactions of all persons natural and artificial, subject to the foregoing provisions, and a few others not important in this connection. The power to tax is the power to destroy as was said in *McCulloch v. Maryland*,⁴ and this power has been used by the National Government to produce a *uniform* currency by taxing out of existence the issues of the state banks, in favor of the National banks, and such a tax was held to be constitutional.⁵ The consequences of this decision were pointed out by Mr. Justice Nelson in his dissenting opinion⁶ as follows:—

¹ *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; *Smyth v. Ames*, 169 U. S. 466, 519-22; *California v. Pacific R. R. Co.* 127 U. S. 1; *Central Pacific R. R. Co., v. California*, 162 U. S. 91.

² *Pollock v. Farmers' Loan & T. Co.*, 158 U. S. 601.

³ *Nicol v. Ames*, 173 U. S. 509.

⁴ 4 *Wheat*, 316 (1819).

⁵ *Veazie Bank v. Fenno*, 8 Wall. 533; *Casey v. Galli*, 94 U. S. 673; *National Bank v. U. S.*, 101 U. S. 1.

⁶ In *Veazie Bank v. Fenno*, 8 Wall. 533.

"It is true the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporation, such as railroads, turnpikes, manufacturing companies and others."

Such a tax is not a *direct* tax, and required to be apportioned, but is a tax or excise on a privilege, business, employment or occupation.¹ It perhaps would have to be *uniform* upon the same subjects throughout the country.

A corporation formed by the National Government, not only would be subject to the control of that government in many ways that it could not otherwise be, but in addition might be made subject to a franchise fee or tax that *need be neither uniform nor apportioned* as direct taxes are.

Treaty making power: It has been said that the National Government could not *exclude* an English manufacturing company from coming into any state that did not forbid it and there carrying on its manufacturing business,—and hence the National Government could not reach such a condition. Such certainly is a mistake. Congress can forbid natural persons from entering the states for any purpose, and it certainly has as complete power over alien corporations as over alien natural persons. The right to exclude in this case is not based wholly on the commerce clause, but on the treaty-making power also.

V. *Methods of control.* If our analysis has been correct the things to be controlled are *interstate commerce*, and the *corporations* engaged therein; as things now are, the first is within the exclusive jurisdiction of the National Government, and the second, merely as a corporation,—what it is, who shall be its members, how it shall be constituted, the officers it shall have, and their powers, functions and relations to the members, the amount of stock, the kinds of stock, the consideration for which it is or may be issued, the transfer of its shares, the right to hold shares in other corporations, or to allow its shares to be held by other corporations, the right to consolidate with other corporations, to sell all of its stock or property and go out of business, to lease its property to other corporations, the liability of its officers and members to other persons, the dissolution and winding up,—in short, every thing relating to its birth, anatomy, organization, existence, mode of action, and death,—is now exclusively within the power of the state creating the corporations. As a corporation it is responsible alone

¹ Nicol v. Ames, 173 U. S. 509.

to the state that creates it, and to no other.¹ Only certain acts that it may undertake to perform, which are under the jurisdiction of some other government, give the latter any power over such a corporation, and then only in naming the terms and conditions under which those acts may be performed.

The available methods of procedure are therefore three: (1) State control of state-created corporations; or (2) State and National control of state-created corporations; or (3) National control of national corporations,—engaged in national commerce, interstate and foreign.

1. *As to the first*, as things now stand, we have before seen the practical impossibility of success in this direction. This is generally acknowledged on all sides. It has therefore been proposed that the National Government relinquish, by an act of Congress, all power of control over the interstate commerce of manufacturing and trading companies to the states. In the first place it is doubtful if such an act would be constitutional. The cases upon which such an idea is based are far from sustaining a general act relinquishing control over such commerce, except in a few cases like selling intoxicating liquors² or convict made goods, and as the Court said, "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state,"—such an act of Congress can be valid only in a case of a state law "which could not operate upon articles occupying a certain situation until the passage of the act of Congress."

But again, if Congress should do so, and the relinquishment of its power was constitutional, its operation throughout the country could or would not be uniform,—it must necessarily vary with the different states,—and we would have substantially the conditions existing before the formation of the government under the constitution,—an infinite variety of annoying commercial obstructions.

Such a scheme also, that left out regulating the railroads would not reach half the problem. Still further it would be ineffective, unless it forbade the sale of trust made goods, in the case of a trading company, or forbade individuals as well as corporations from sending such goods into the state; otherwise the goods might be sold by the offending corporation to an individual purchaser in an adjoining state that did not forbid, and he could sell them in the

¹ *State v. Curtis*, 36 Conn. 374.

² *In re Rahrer*, 140 U. S. 545.

state objecting. But still further if effective to the point of exclusion, it would result only in isolating that state from the others, and enable its own industries to charge higher prices.

2. *As to the second method, state and federal control of state-created corporations.* It perhaps is necessary here to take an inventory of the arsenal at hand. And first on the part of the state: (1) It has entire control and jurisdiction over its own corporations and their actions; (2) It has no control or jurisdiction of a corporation merely as a corporation formed in another state,—what it is, or may do, is for the state that creates it to determine; (3) It has no control over the interstate commerce of such corporation; (4) It has the power to control, or fix the terms upon which a corporation created in another state may *enter* into the state and carry on business there, other than interstate commerce; (5) All the states together could enact uniform corporation laws, and uniform laws for the admission and control of foreign corporations,—but the probability of such a thing being done is an idle dream.

Second, on the part of the National Government: (1) It has power to control interstate commerce, possibly to the extent of prohibiting it, though in the case of “a healthy commodity of trade, a necessity to life,” it is doubtful if Congress could impress it “with a permanent condemnation,” so that it could not be exported out of one state into another.”¹ (2) It can tax any one for the privilege of engaging in interstate commerce, if all are taxed uniformly, good and bad, alike. (3) It has no jurisdiction over a state-created corporation, merely as such, to prescribe what shall be its powers, rights or privileges; these are for the creating state to determine. The National Government can reach it only through the taxing or commerce power.

The recent discussions have centered around the state and national anti-trust acts, and the inter-holdings of stocks by corporations actually engaged in interstate commerce, and holding of the stocks in such corporations by other corporations not in any other way engaged in interstate commerce. But they will arise in, and have to be decided in connection with a *telegraph* company,—say like the Western Union Telegraph Co.; a railroad company, as in the Northern Securities Company; a manufacturing company, as the United States Steel Corporation; and a trading corporation.

The anti-trust act of the National Government provides:—

¹ Mr. Stimson, Opinion to Indus. Com. Rep. Vol. XIX., p. 705.

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished," etc.

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.¹

The state acts differ somewhat from this, but for the purpose of this discussion, this may be taken as a fair sample of the general tenor of the state acts, except that they relate to commerce within the individual states,—some thirty-two² of the states having anti-trust acts of various degrees of stringency.

These acts make contracts, and combinations, of the kind named and monopolies (whatever that may mean in the statute), crimes which neither of them would be without the statute. Without any statute such contracts and combinations in unreasonable restraint of trade, were looked upon as *ultra vires* in the case of a corporation not expressly authorized to make such contracts, to such extent that the state that created such offending corporation might by quo warranto proceedings forfeit its charter, or enjoin carrying out such a contract.³ Aside from this case of a corporation, the state had no right to complain of contracts in restraint of trade,—it could only refuse to enforce them in a suit between the offending parties, and could not enjoin the parties from carrying them out, if they were willing.

Some of the questions involved are raised in the two Northern Securities cases—the state case,⁴ and the national case,⁵ now both before the Supreme Court.

The first involves the state's power, and the second the National Government's power. In the state case the question is whether certain acts in the way of organizing the Northern Securities Co., incorporated in New Jersey, and which exchanged its shares for the shares of a majority of the shareholders in the Great Northern Railway Co., incorporated in Minnesota, and for the shares of a majority of the shareholders in the Northern Pacific Railway Co., incor-

¹ Act of July 2, 1890, 26 Stat. at L. 209 ² 2 Indus. Com. Report.

³ *People v. North River Sug. Ref. Co.*, 121 N. Y. 582; *State v. Standard Oil Co.*, 49 U.S. 137.

⁴ *Minnesota v. Northern Securities Co.*, 123 Fed. 692.

⁵ *U. S. v. Northern Securities Co.*, 120 Fed. 721.

porated in Wisconsin, violates the Minnesota anti-consolidation of parallel lines of railway act, and the anti-trust act of that state. The decision of Judge Lochren says they do not.¹ An appeal has been taken to the Supreme Court, and argued, but not yet decided. If the decision of the lower court is sustained, it will destroy any effective state control of interstate railways, leaving no remedy in the state except a repeal of the charter (if the right to repeal exists, which we understand is not the case with the Great Northern), or condemning the lines of the offending companies under the power of eminent domain,² and the state undertaking to operate them, or turning them over to a company formed as the state shall direct. Besides such a decision holding that such acts on the part of the organizers of the Northern Securities Company, do not violate the Minnesota anti-trust act, will make the trusts acts of the other thirty or more states of no legal consequence in preventing such combinations of interstate railways; such decision would seem also necessary to substantially annul the national act as a method of regulation.

If the decision of Judge Lochren is reversed on the ground that the act of organizing the Northern Securities Company, and giving it, through stock ownership, the control of two parallel lines of railway, violates the anti-consolidation law, as it seems to me the Court is likely to hold,—all states having such laws will have some authority over such lines within their state; but this pushed to the last extremity only enables the state to prevent them from being operated within the state under one management, and to be entirely effective would result in cutting the roads up into sections limited by the lines of such states as had or enforced such a law.

If the decision is reversed on the ground that the merger violates the state anti-trust act, then Minnesota and the other states having similar acts, could enjoin the operation of such roads in their respective states, by such offending company; but this, also at the last extremity, could be enforced only by breaking such lines up into sections limited by state boundaries. In both the foregoing cases, the laws of Minnesota, without being supplemented by the national law of a similar kind, could not prevent the lines of these companies being operated together under the Northern Securities charter in an

¹ *Minnesota v. Northern Securities Co.* 123 Fed. 692.

² *Erie and North East Railroad v. Casey*, 26 Pa. St. 287 (1856); *People v. O'Brien*, 111 N. Y. 1 (1888).

adjoining state that did not object. Even if both companies were organized in Minnesota, and the state could compel a surrender of the shares by the Northern Securities Company, such a proceeding would not prevent the same persons incorporating in the adjoining state with the same amount of stock and turning it over to the Northern Securities Company, vesting the management of the parallel lines in the adjoining states in that company. In other words, such remedies as the state might enforce, if they had full power would be finally only to break continuous interstate railroads into state sections under separate companies,—and then the remedy would be worse than the disease.

But if the decision is reversed on the ground that the state anti-trust act was violated, it would almost necessarily follow that the national anti-trust act was violated also. This is the question directly involved in the government case, and the decision of Judge Thayer is to the effect that the merger was formed by a "contract in restraint of trade or commerce among the several states,"¹ substantially on the ground that the natural and inevitable tendency of the merger would be a restraint of such trade, and that the parties must have contemplated and intended the natural consequences of their acts. This decision has been severely criticised,² though under the evidence and facts that seem to have been brought out the court did not appear to go far astray in refusing to believe the men who formed the company were too dull or too stupid to comprehend the natural result of their acts. This decision is now before the Supreme Court for consideration and if sustained upon the principles laid down in the unanimous decision of the court below, or upon the ground so clearly and so succinctly stated by Sir Frederick Pollock in a recent review,³ will yet leave many unsolved problems, such as, will it apply to the case of the purchase outright of one railroad by another as was done by the two companies, the Great Northern and the Northern Pacific, in the purchase of the Burlington? Or to a company formed as the Western Union Telegraph Co? Or to a manufacturing company,

¹ U. S. *v.* Northern Securities Co. 120 Fed. 721.

² Prof. C. C. Langdell, in 16 Harv. L. R. 539; 17 Harv. L. R. 41. The decision in the Merger Case, by J. L. Thorndyke, (I have not seen this pamphlet, published by Little, Brown & Co.) See also "Considerations on the State Corporations in Federal and Interstate Relations," by Carmen F. Randolph, Columbia, L. R., March, April, May, 1903. This is much the best argument according to my view, that I have seen.)

³ The Merger Case and Restraint of Trade, Sir Frederick Pollock, 17 Harv. L. R., Jan. 1904, p. 151.

as the United States Steel Corporation? Or to a purely trading company as some of the great department stores? Or to the inter-holdings of stocks by companies engaged in the same or different kinds of businesses? Or to an insurance company, or one of a similar kind, purchasing in the market enough stock to control various railways or manufacturing companies, primarily for investment, and incidentally resulting in management? No one of these questions can be completely answered by the decision of the government case, for they are not involved; they can be answered only after long continued litigation, every step of which will be stubbornly contested. It is more than doubtful that all or even most of these will be held to violate the anti-trust act. But suppose stockholding combinations such as the Securities Co. is, is declared to be illegal. Is it not certain that in some state, a corporation similar to it will be formed, its stock subscribed, the money paid in, and, the sum used to buy outright the property of competing companies? Will that be illegal? To take the case of the Western Union Telegraph Co. It was formed largely out of consolidations with, and purchases outright of the stock or property or both of, various other companies, all perhaps lawful by the laws of the places where they occurred and were completed before the national act was enacted. It has only a single competitor throughout the country of any consequence—the Postal Telegraph Co. It has been stated that these two companies have such an understanding about rates as to violate the anti-trust act; but suppose they have not; nevertheless, the Western Union Telegraph Co. is, and has been, one of the most complete monopolies in the country, using that word in its popular significance, as expressing the condition of things that is deemed menacing. It is more than doubtful that the purchase outright of the property of one company by a competing company would be within either provision of the national act,¹ and if it was held to be it is more than likely the act would be unconstitutional.

Suppose the Postal Telegraph Company should fail, wind up its affairs, tear down its poles and go out of business,—then the Western Union Company would become the *sole seller* of telegraphic communication. Would the national anti-trust act apply? Would there be any contract in restraint of trade there? Would the second

¹ U. S. v. E. C. Knight Co., 156 U. S. 1; *State v. Shippers Compress Co.*—Tex.—, 69 S. W. 58; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; but compare *Harding v. Am. Glucose Co.*, 182 Ill. 551; *State v. Schlitz Brewing Co.*, 104 Tenn. 45.

section:—"Every person who shall monopolize," apply to one who became the sole trader because his competitors went out of business without his having anything to do with it? It is apprehended not—no one certainly could be punished for the *legal* acts of another done without participation by the former. Yet in sober fact would not the monopoly be greater, and the effects worse, and is not this the thing that is really feared,—the *unregulated big thing*,—the thing that has, because of its size, extent of operation, and interest, the power to do harm if not harnessed? And what is here said of the telegraph company applies to railroad, trading, or manufacturing as well. Most people are more afraid of one uncaged lion than of a thousand properly caged,—and the danger is vastly greater. The road to regulation through anti-trust, anti-contract-in-restraint of trade, and anti-monopoly acts, is long, uncertain, inefficient, and inadequate in the end,—and may destroy the very thing, which if properly regulated, is desirable or necessary for the welfare of all.

But suppose all these were held to be within the act as it now stands, or one that might be made. What would be the result? The vast bulk of our business would be under the ban of illegality, and have to be reorganized. How? Under the same state corporation laws as before, or as they might be amended to meet the changed conditions. Has any one any reason to believe the new regime would be better than the present? Would not the same diversity of view, policy, legislation, and result as now exist soon grow up again if organization had to proceed under state laws.

After all does it not come back to a question of size and power? Can anything less than marking a limit as to size, or strict regulation otherwise, be effective? No state can fix a limit of size except for its own corporations; and no state can fully and completely regulate any but its own corporations. Never can or will the action of all the states be uniform in these particulars. As has been said before, the thing to be regulated is the big thing, the big, *menacing* corporation; its national commerce is to be regulated; its holding of stock in other companies is to be regulated; its power to consolidate is to be regulated; its issue of shares is to be regulated; its promotion and organization are to be regulated; its capitalization is to be regulated; its competition with others throughout the country is to be regulated. These are the things necessary to be done for the welfare of all. One state might do all these things except regulate the interstate commerce of the corporation it formed,—and do them well. Another state might do the same things,—but do them

wrong; and in the forty-five states there would be some that would do them all wrong; that is the condition in which we now are and from which we seek relief.

3. *The third method. A national incorporation law.* No power or authority to do these in the proper and uniform way resides anywhere except in the National Government. The government, of course, could act either by prescribing the conditions under which corporations to engage in interstate commerce might be formed by the states, and forbid others from carrying on such commerce; or might itself provide for the formation of corporations to carry on the interstate commerce of the country. In the former case, in every particular except what the government prescribed, there would be variation among the states that would breed differences, conflicts, and litigation; and besides the state alone would have direct and positive authority over the corporations it created. Of what possible advantage could this be, except to retain certain taxing privileges, many of them unjust, or to retain litigation within the state courts. But if the foregoing enumerated things are necessary to be regulated in order to give relief from the ills we suffer, the conditions necessary to prescribe would be so nearly equivalent to passing an incorporation act by the government itself,—without retaining control over the creature created, that it seems to me it would be much wiser to enact a national incorporation law, in such a manner as to give the National Government unequivocally the ordinary powers of complete control that any state has over its own corporations.

That such an act will, in the future, after we have tried and failed in every other way, be the only simple and adequate remedy is generally admitted by several who have closely studied the matter,¹ yet nearly all shrink from advocating it because of various imaginary dangers, some of which may be enumerated: (1) Enormous centralization of our government. (2) Overburdening the United States courts. (3) Substantially bringing all our property and civil rights under the jurisdiction of the National Government.

Mr. Stimson has stated the general objections as strongly as any I have seen:—

"The notion of 'state rights,' what remains of it, would be riddled. Ninety per cent of the business of the people would be taken from the control of their own states and their own courts and put under the control of the

¹ Indus. Com. R. Vol. XIX, p. 645; Mr. Stimson's Opinion as Advisory Counsel, to the Commission, Vol. XIX, p. 711; Mr. Hufcut, Statement to Commission, Vol. XIX, p. 722.

federal government. For in regulating these federal corporations Congress would control not only their relations with sellers and buyers,¹ with their creditors and stockholders, but with the labor they employed, national eight hour laws would become possible without constitutional amendment."²

To these something in the way of answer may be suggested. (1) There is no concentration of power,—all that is to be exercised now exists in the National Government; there is therefore no shifting of the balance of powers. (2) It has become apparent that the state governments are unequal to the task,—because they have not, and never since the Constitution have had, the power. Because they can not exercise the power, shall the National Government refuse to exercise it when the occasion demands, and when it was conferred upon *that* government to be exercised "in order to promote the general welfare" as much as any other power? (3) But all the civil rights that are to be so seriously affected, we now hold and always have held, under the same possibility of being limited, expanded, and controlled for the benefit of all, when occasion demanded. (4) But also, it is "we the people" that control in the Federal Union as well as in the states. The National Government was created to do for the benefit of all, what the states could not do, within the terms of the Constitution. (5) The burdening of the courts might occur temporarily, but not likely to any great extent. Complexity, diversity, conflict, uncertainty, beget litigation. Simplicity, uniformity and certainty have the reverse effect. But even if otherwise the creation of the necessary courts is not often made a plea for refusing to relieve a threatening condition of national extent and operation. (6) Such, or similar, dire results were predicted from the establishment of National banks, but they proved to be *imaginary* and not *real*.

There seems to be but one supreme legal test involved in this method,—and that is could the National Government, if it found it necessary, or desirable, classify corporations according to their size and extent of operation, and require if found necessary, all above a certain size to forego the privilege of engaging in interstate commerce, or tax them so it would be unprofitable, unless they organize under a national act? We believe this question will be answered in the affirmative. The rest would depend on the wisdom of Congress.

¹ This is what *Mr. Jefferson* argued was the design of the Commerce clause. See quotation given above from him.

² Opinion to *Indus. Com.* Vol. XIX, p. 700.

Such a national incorporation act should be liberal enough to encourage honorable industrial enterprises; strict enough to prevent fraud and oppression; should protect from unjust state exactions, but require complete compliance with all the laws; should permit large profits commensurate with great risks undertaken, and require the risks and liabilities to be assumed and discharged by those undertaking them; should allow extensive operations and the power and capital necessary to carry them on, but prevent their use as a club to obstruct or destroy others as legal as they; and in general allow great things to be done or undertaken, in subservience to, but not in defiance of, the general welfare; be great to strengthen the hands and add energy to the capital of the honorable and dutiful, and be administered by a power strong and quick to smite the dishonorable and disobedient.

Such an act might preserve for the benefit of all the manifold economies that can come from large associations for carrying on large, useful and necessary or beneficent enterprises, and at the same time shield all from the menace of unregulated greed or cupidity, so far as such ends can be accomplished by law administered by human officers and tribunals.

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